



REPUBLIC OF KENYA



Diamond Trust Bank Kenya Limited v Abdulrazak (Commercial Miscellaneous Application E036 of 2025) [2025] KEHC 11096 (KLR) (28 July 2025) (Ruling)

Neutral citation: [2025] KEHC 11096 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
COMMERCIAL MISCELLANEOUS APPLICATION E036 OF 2025**

PN GICHOHI, J

JULY 28, 2025

BETWEEN

DIAMOND TRUST BANK KENYA LIMITED APPLICANT

AND

JAMILA LEILA ABDULRAZAK RESPONDENT

RULING

1. What has come up for determination before this court is the Applicant's Notice of Motion dated 12th June, 2025, brought under sections 1A,1B, 3A, 11 and 18 (1)(a) of the *Civil Procedure Act*, Order 51 of the Civil Procedure Rules, Article 50 and 165(3)(a) of the *Constitution* of Kenya, seeking for Orders that:-
 1. This Court be pleased to grant the Applicant/intended Plaintiff leave to file a suit against the Respondent/ Intended Defendant in the Chief Magistrates Court at Nakuru.
 2. The Honourable Court be pleased to grant such other orders as may be just in the circumstances and incidental thereto.
 3. Costs of this Application be provided for.
2. The grounds are on the face of the Motion and the Supporting Affidavit sworn by Joyce Omalla, the Applicant's Advocate, on even date. In her affidavit, Ms. Omalla states that on 18th June, 2019, the Applicant approved the Respondent's staff loan application for Kshs. 2,000,000 under the staff loan scheme, to be repaid in 60 monthly instalments.
3. She avers that the terms of the loan were inter-alia that the loan was to be paid through payroll check-off and that a default in any remittance of the monthly instalments shall amount to breach of contract and shall render the whole loan balance due and payable.



4. The Applicant asserts that while the Respondent initially made loan payments as agreed, she later defaulted on certain monthly instalments, leading to accrued penalties. That despite repeated demands for the defaulted sum, the Respondent has failed or refused to settle the outstanding loan balance accruing to the sum of Kshs. 3,684,026.89 as at 27th February, 2024.
5. She states that although this amount falls within the pecuniary jurisdiction of the Chief Magistrates Court, Clause 14 of the staff loan agreement explicitly mandates that any legal action stemming from the agreement must be initiated in the High Court, Commercial Division.
6. The deponent states that they are well aware that the suit should be filed in the lowest grade of Court competent to try it in the bid to maximize the limited judicial resources.
7. She therefore argues that that the Chief Magistrate’s Court is the competent court in this case, but due to the stated clause of the loan agreement, leave is necessary to enable them file the suit at the Chief Magistrates Court.
8. The Applicant urges this Court to allow the application and grant them leave to file the suit at the Chief Magistrates Court.
9. The application herein was served upon the Respondent on 30th June, 2025 as evidenced by the Affidavit of Service sworn Flora Khatambi, a licensed Court process server, on 4th July, 2025. Despite service, the Respondent did not file a response. The application therefore proceeded unopposed.

Analysis and determination

10. Upon perusal of the application, the Supporting Affidavit and the annexures therein, the only issue for determination is whether leave should issue to the applicant to institute the intended suit at the Chief Magistrates Court.
11. The leave sought is based on Clause 14 of the parties’ loan agreement dated 18th June, 2019, which states that:-

“ This agreement shall be governed by and construed in accordance with the laws of Kenya and any legal action or proceedings arising out of or in connection with this agreement shall be brought in the High Court of Kenya, Commercial Division.”
12. This is a term of the loan agreement between the Applicant and the Respondent which binds both of them. To ask for leave to have their dispute heard by the Magistrate Court instead of the High Court captured at Clause 14 and without any consent by the Respondent is tantamount to the Applicant urging this Court to rewrite that particular Clause of the contract which act is untenable.
13. The court’s role is to interpret and enforce the contract as written, not to create a new one. A court of law cannot rewrite a contract between parties. Indeed, the Court of Appeal in *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another* [2001] KECA 362 (KLR) stated :-

“ A court of law cannot rewrite a contract between parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded or proved.”
14. Whereas High Court has unlimited original jurisdiction as provided for under Article 165 (3)(a) of the *Constitution*, the Magistrate’s Court would only be limited by pecuniary jurisdiction based on the rank with the highest being for the Chief Magistrate capped at Kshs. 20,000,000/=.



15. Based on the amount indicated in this Application, it is apparent that both the Magistrates Courts and the High Court have jurisdiction over the intended suit.
16. However, the Court cannot interfere with the agreed contract between the parties unless there is evidence of fraud, misrepresentation, undue influence, or other factors that would invalidate the contract.
17. Therefore, there is no justification for filing the suit before the Chief Magistrates Court in the circumstances stated herein
18. In light of the foregoing:-
 1. The application dated 12th June, 2025, is dismissed for not only lacking merit but also for being an abuse of the Court process.
 2. The Applicant to bear his own costs.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 28TH DAY OF JULY, 2025.

PATRICIA GICHOHI

JUDGE

In the presence of:

Ms. Omala for Applicant

N/A for Respondents

Ruto- Court Assistant

